

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

**NEW YORK-PRESBYTERIAN BROOKLYN  
METHODIST HOSPITAL**

**Employer**

**and**

**Case 29-RC-266498**

**1199SEIU UNITED HEALTH CARE WORKERS  
EAST**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

On September 23, 2020,<sup>1</sup> 1199SEIU United Health Care Workers (the Petitioner) filed a representation petition, pursuant to Section 9(c) of the National Labor Relations Act (the Act), seeking to represent certain employees of New York-Presbyterian Brooklyn Methodist Hospital (the Employer) at its acute care hospital in Brooklyn, New York. A hearing officer of the National Labor Relations Board (the Board) conducted a hearing in this matter by videoconference on October 19, and the parties timely submitted post-hearing briefs.

The sole issue in this matter is whether to conduct an election by manual or mail ballot. On November 9, after the hearing closed and the parties had submitted their post-hearing briefs, the Board issued its decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), which provided guidance for assessing the propriety of mail-ballot elections during the Covid-19 pandemic. The parties were given the opportunity to file and subsequently filed supplemental briefs in light of *Aspirus Keweenaw*.

The Employer contends that a manual election is appropriate and that the standards announced in *Aspirus Keweenaw* do not dictate otherwise. The Petitioner asserts that a mail-ballot election is appropriate because the COVID-19 pandemic presents extraordinary circumstances warranting such an election, and *Aspirus Keweenaw* allows for a mail-ballot election due to the increasing number of COVID-19 cases in the relevant geographic area. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated to me the authority to decide this matter.

Having carefully considered the entire record in this matter, I am directing that this election be conducted by mail ballot. To give context for my discussion of this matter, I begin with facts relating to the Employer's operations and the Petitioner's petition. I then review the Board's decision in *Aspirus Keweenaw*. After that review, I summarize the parties' positions. Following those summaries, I discuss my reasons for directing a mail-ballot election. Finally, I conclude with my findings.

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<sup>1</sup> All dates are for the year 2020.

### **The Employer's Operations & the Petitioner's Petition**

The Employer, a New York not-for-profit corporation, operates a hospital located at 506 Sixth Street in Brooklyn, New York. The hospital is a voluntary acute care teaching hospital with over 600 beds, providing health care services to over 42,000 inpatients each year.

The Petitioner currently represents a bargaining unit of professional employees employed at the Employer's hospital. The Petitioner now seeks to add all full-time, regular part-time, and per diem physician assistants at the Employer's hospital to the existing unit of professional employees. There are approximately 103 employees in the petitioned-for unit.

### **The Board's Decision in *Aspirus Keweenaw***

In *Aspirus Keweenaw*, the Board outlined six situations "that will normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by [the COVID-19] pandemic." Id. slip op. at 4. The six situations are as follows:

- (1) The NLRB office tasked with conducting the election is operating under "mandatory telework" status.
- (2) Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.
- (3) The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size.
- (4) The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols.
- (5) There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status.
- (6) Other similarly compelling considerations.

The Board found that in the presence of any of the above situations, Regional Directors must consider directing a mail-ballot election; however, the presence of any of these situations does not require a mail-ballot election. Furthermore, the Board stated that Regional Directors who direct mail-ballot elections in any of the above situations will not be found to have abused their discretion. Id. slip op. at 8.

### **The Parties' Positions**

#### **A. The Employer's Position**

The Employer requests an election by manual ballot, asserting that the Employer is capable of hosting a safe in-person election. In support of this assertion, the Employer notes the following:

- The hospital maintains strict visitation guidelines;
- The hospital screens all visitors, which includes a temperature check and a requirement that visitors attest to a lack of symptoms and not having travelled to restricted states;<sup>2</sup>
- The hospital requires masks, gloves, and gowns in all clinical environments;
- The hospital requires social distancing; and
- Employees are trained in infection control measures.

The Employer also notes that the hospital is not located in a designated COVID-19 hotspot, and it argues that in-person voting does not present any increased risk to voters.

The Employer proposes holding the election in the hospital's auditorium. The auditorium has separate entrances from the outside, allowing for Board agents and party representatives to enter the voting area without passing through patient or public areas of the hospital. The auditorium also has two entrances/exits, which will allow voters to enter and exit the voting area using separate doors. The front of the auditorium has sufficient space to allow the Board agent and observers to socially distance. The auditorium is regularly cleaned with disinfectant in accordance with guidelines from the Center of Disease Control and Prevention (CDC). The Employer will place markers on the floor of the auditorium to direct foot traffic through the voting area.

The Employer also notes that it will disinfect all tables, chairs, writing implements, and other surfaces that may be used for a manual-ballot election.

In addition to the above, the Employer has affirmed its ability to implement the protocols set forth in General Counsel Memorandum 20-10, Suggested Manual Election Protocols (GC 20-10).

The Employer proposes three voting periods, but the record is unclear as to the exact times for the periods.<sup>3</sup> The Employer also proposes a release schedule for voters to allow for small groups

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<sup>2</sup> Regarding travel to restricted states, New York maintains a list of "restricted states." If an individual travels to one of those restricted states, New York requires the individual to quarantine for 14 days upon return to New York.

<sup>3</sup> At hearing, the Employer stated its preferences for the three voting periods as "6 through 9, 11 through 1, and 5 through 5." The record does not include whether these are a.m. times or p.m.

of employees to vote while the polls are open; however, the record contains no further details on the proposed release schedule, such as who will release the voters, how many voters will be released at a time, and how long voters will be given to vote.

The Employer argued that the November 3 elections, including the United States presidential election, present risks to mail balloting in the present matter. The Employer contends that the large increase in mail-ballot voting for the November 3 elections has resulted in increased mail volume for the Postal Service, causing the Postal Service to advise the New York Board of Elections that it could not guarantee timely delivery of ballots for less than 15 days before the November 3 election. Additionally, the Employer notes that the Postal Service has missed its on-time delivery targets for first-class mail for the area where the hospital is located.<sup>4</sup>

The Employer also argues that voters may be disinclined to vote by mail in the present matter because prominent politicians have attacked the integrity of mail ballots.

In its supplemental brief in response to *Aspirus Keweenaw*, the Employer argues that none of the factors warranting consideration of a mail-ballot election are present:

- (1) The Region 29 Office is not currently under a “mandatory telework” status.
- (2) The 14-day testing positivity rate in the hospital’s zip code is below five percent. The Employer notes that although there is a slight upward trend in new cases of COVID-19, it is not meaningfully significant.
- (3) The election can be conducted in compliance with New York’s restrictions on gathering sizes. As of the date of the Employer’s supplemental brief, the gathering restriction was for 50 individuals for indoor gatherings.<sup>5</sup>
- (4) The Employer has agreed to comply with the protocols set forth in GC Memo 20-10.
- (5) The Employer’s hospital is not experiencing a COVID-19 outbreak. The Employer notes that the proposed election area is away from patient areas.

## **B. The Petitioner’s Position**

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times, nor does the record contain an explanation as to why these times are appropriate for the eligible voters.

<sup>4</sup> In noting the Postal Service’s failure to meet its time targets, the Employer relies on information obtained from the Associated Press. See <https://interactives.ap.org/postal-service-performance/>.

<sup>5</sup> I take administrative notice of New York Governor Andrew Cuomo’s Executive Order No. 202.45, dated June 26, 2020, in which the governor increased the limit on non-essential indoor gatherings to the fewer of either 50 individuals or 50 percent maximum occupancy.

The Petitioner asserts that mail balloting is the safest and most appropriate method for conducting an election in this case. The Petitioner argues that although the Employer has offered some information as to how it may conduct the election, the Employer has failed to provide certain information that is necessary in making a decision on the election method, such as community transmission rates or virus statistics in the neighborhood. Specific to the Employer's hospital, the Petitioner points out that the Employer has not specified the number of active COVID-19 cases being treated at the hospital, the number of members of the proposed unit who treat COVID-19 patients or work in areas where COVID-19 patients may be treated, the number of hospital employees under quarantine, or the overall rate of infection among employees.

The Petitioner argues that although the eligible voters in the present case may all work at the Employer's hospital, the voters do not regularly interact with one another, nor do they regularly interact with individuals who would enter the hospital for a manual election, such as the Board agent(s) or the parties' representatives. Consequently, the Petitioner claims that voters may risk transmitting COVID-19 to any of the involved parties, including other voters. Additionally, the Petitioner notes that Board agent(s) or the parties' representatives could bring COVID-19 into the hospital.

The Petitioner contests the Employer's argument that a mail-ballot election would disenfranchise voters because of the strain of the November 3 elections on the Postal Service. The Petitioner argues that because the Employer requested an opportunity to file a post-hearing brief in this matter, mail ballots in this case would likely be mailed to voters after the November 3 elections had ended, which is clearly the case now.

In its supplemental brief in light of *Aspirus Keweenaw*, the Petitioner argues that a mail-ballot election is appropriate in this case under two of the enumerated situations.<sup>6</sup> First, as of November 16, the 14-day trend of new cases increased from 208 to 425.<sup>7</sup> Second, New York Governor Andrew Cuomo has limited indoor gatherings to 10 individuals, and the Employer has not addressed how it will arrange for an election that does not violate the state guideline.

Lastly, the Petitioner argues that the Board's decision in *Aspirus Keweenaw* does not contradict its earlier decision to deny review of a Decision and Direction of Election in *Jersey Shore University Medical Center*, 22-RC-263932, 2020 WL 5878265 (Oct. 1, 2020) (not reported in Board volumes), and so I should apply the Regional Director's rationale in that case to the present matter. In that case, the Regional Director determined that a mail-ballot election was

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<sup>6</sup> The Petitioner also noted in its supplemental brief that the Employer had not committed to abide by the protocols of GC 20-10. However, the Employer noted that it had the ability to implement the protocols in its initial brief, and it has stated its agreement to abide by those protocols in its supplemental brief.

<sup>7</sup> The Petitioner cites to data from John Hopkins University, <https://coronavirus.jhu.edu/us-map>, and Kings County, <https://bao.arcgis.com/covid-19/jhu/county/34003.html>.

necessary where (1) Board agents may be exposed to COVID-19 while at a hospital, and (2) quarantined employees would be disenfranchised because they could not appear in person for a manual-ballot election.

### **The Election Method**

Having carefully considered the entire record in this matter, I am directing a mail-ballot election. As discussed below, I find that the 14-day trend of increasing COVID-19 cases in Kings County, where the Employer's hospital is located, suggests that the virus is spreading in the relevant geographic area, and a mail-ballot election will serve to safeguard the health of all interested parties.

Initially, I take administrative notice of the current state of the COVID-19 pandemic. As of November 18, there have been over 11.3 million cases of COVID-19 in the United States and 247,834 deaths. New York City, on its own, has seen a total of 289,018 confirmed cases of COVID-19 and 19,479 deaths since January 21.<sup>8</sup>

As noted above, the Board has laid out five specific situations in which Regional Directors should consider a mail-ballot election during the COVID-19 pandemic. If Regional Directors direct mail-ballot elections under the circumstances of any one of those five situations, the Board will not find that the Regional Directors abused their discretion in directing such an election.

Specific to the present matter, Kings County is seeing an upward trajectory of documented COVID-19 cases. As of November 18, Johns Hopkins University's website<sup>9</sup> showed the following number of new cases in Kings County for each day for the preceding fourteen days:

<b>Date</b>	<b>Number of New Cases</b>
November 17	404
November 16	315
November 15	425
November 14	455
November 13	483
November 12	450
November 11	485
November 10	328
November 9	331
November 8	356
November 7	349

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<sup>8</sup> See [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days).

<sup>9</sup> See <https://coronavirus.jhu.edu/us-map> or <https://bao.arcgis.com/covid-19/jhu/county/36047.html>.

November 6	368
November 5	353
November 4	325

In averaging the change in the number of new daily cases, the number of new daily cases rose at an average rate of six additional cases per day. Although the Employer argues that this rate of increase is not significant, the Board in *Aspirus Keweenaw* did not specify a magnitude by which the number of new cases must increase. Instead, the Board's standard is that "a mail-ballot election will normally be appropriate if... the 14-day trend in the number of new confirmed COVID-19 cases in the county where the facility is located is increasing." *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 5. Based on this upward trend in Kings County, I find that a mail-ballot election is appropriate in this case.

As to the Employer's other arguments in light of *Aspirus Keweenaw*, I agree that the other factors do not apply in the present matter.

Regarding the Petitioner's additional arguments in light of *Aspirus Keweenaw*, I do not find them persuasive. First, the Petitioner notes that Governor Cuomo reduced the number of individuals for indoor gatherings to ten. However, according to the transcript of Governor Cuomo's announcement<sup>10</sup> and New York State's Reopening website,<sup>11</sup> this reduced limit for indoor gatherings is only for non-essential gatherings at private residences. Here, the gathering for a manual election would not occur in a private residence, so Governor Cuomo's recent announcement is inapplicable.<sup>12</sup>

Second, the Petitioner argues that because the Board did not contradict its decision to deny review of the Decision and Direction of Election in *Jersey Shore University Medical Center*, above, I should direct a mail-ballot election for the same reasons given by the Regional Director in that case. While the Board may not have contradicted its earlier decision to deny review in that case, the Board explicitly set forth the standard for mail-ballot elections during the COVID-19 pandemic in *Aspirus Keweenaw*, and it is the Board's standard that is controlling in this case. Accordingly, I am not guided by the rationale of a Decision and Direction of Election that issued prior to *Aspirus Keweenaw*.

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<sup>10</sup> See <https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-announces-restaurants-bars-other-sla-licensed-entities>.

<sup>11</sup> See <https://forward.ny.gov/reopening-what-you-need-know>.

<sup>12</sup> I note that the 50-person limit of Governor Cuomo's Executive Order 202.45 is for "non-essential gatherings." It is unclear whether this 50-person limit would apply to an essential gathering, such a Board election. Governor Cuomo's executive orders do not specify a limit for essential gatherings. In any event, because I have found that a mail-ballot election is appropriate under a different factor, I find it unnecessary to resolve this uncertainty.

In summary, because the 14-day trend of increasing numbers of COVID-19 cases in Kings County, I am directing a mail-ballot election in this matter.

### **CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**Included:** All full-time, regular part-time, and per diem physician assistants employed by the Employer at its facility located at 506 Sixth Street in Brooklyn, New York.

**Excluded:** All chief physician assistants, senior physician assistants, all other employees, manager, confidential employees, guards, and supervisors as defined by section 2(11) of the Act.

If a majority of the valid ballots in the election is cast for the Petitioner, the employees will be deemed to have indicated their desire to be included in the existing professional bargaining unit currently represented by the Petitioner at New York-Presbyterian Brooklyn Methodist Hospital, and it shall bargain for those employees as part of that unit. If a majority of the valid ballots is cast against representation, the employees will be deemed to have indicated their desire to remain unrepresented, and a certification of results of election will issue to that effect.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by 1199SEIU United Health Care Workers.



### **A. Election Details**

I have determined that a mail ballot election will be held. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the National Labor Relations Board, Region 29, on **December 7, 2020**. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void. The mail ballots will be counted by video conference on a date and at a time and manner to be determined by the Regional Director after consultation with the parties.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 29 office by close of business on **December 30, 2020**.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact **Rachel Zweighaft** by telephone at (718)765 6166 or by e-mail at [rachel.zweighaft@nrlb.gov](mailto:rachel.zweighaft@nrlb.gov) by no later than 5:00 p.m. on **December 15, 2020** in order to arrange for another mail ballot kit to be sent to that employee.

### **B. Voting Eligibility**

Eligible to vote in the second election are those employees in the unit who were employed during the payroll period ending immediately before **November 21, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the date of the first election, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Also eligible to vote using the Board's challenged ballot procedure are those individuals employed in the classifications whose eligibility remains unresolved as specified above and in the Notice of Election.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **C. Voter List**

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available

personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **November 25, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

#### **D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting

requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: November 23, 2020



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KATHY DREW-KING  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 29  
Two Metro Tech Center  
Suite 5100  
Brooklyn, NY 11201-3838